No. 16,422

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CALIFORNIA COMPRESS COMPANY, INC.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

REPLY BRIEF FOR THE CALIFORNIA COMPRESS COMPANY, INC., RESPONDENT

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Authorities Cited

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JURISDICTION

It is conceded that Respondent, California Compress Company, Inc., was and is engaged in interstate commerce within the meaning of Section 2(6)(7) of the Labor Management Relations Act and that this Court has jurisdiction pursuant to Section 10(e) thereof.

STATEMENT OF FACTS

The uncontroverted facts show that on November 6, 1957, the International Longshoremen's and Ware-

housemen's Union petitioned the National Labor Relations Board, 20th Region, requesting certification as the Collective Bargaining Representative of Respondent's employees. The Respondent was immediately notified that a petition for representation had been filed but seriously and in good faith doubted the authenticity of any signature cards which purported to show a sufficient showing of interest and in good faith doubted that any of its employees were seeking Union representation. On or about November 8, 1957, Lawrence Young, Plant Superintendent, spoke to a group of employees in the boiler room or smoke room. On December 5 and 6, 1957, the Respondent caused to be circulated an affidavit or document (General Counsel's Exhibit 2) which reads as follows:

"State of California,
County of Fresno—ss.

"The undersigned, each for himself, after first being sworn, deposes and says:

"That he was on the 6th day of November, 1957, and is now, employed by California Compress Co., Inc., a corporation, at its cotton compressing plant at Nielsen Avenue and Marks Street, Fresno, California, and in such employment performs production and maintenance work; that he has not affixed his signature to any card or paper intending thereby, or being advised that such signature would be used, to support a claim of representation by International Longshoremen's & Warehousemen's Union, Independent, and that he has not knowingly signed any such document."

(82 employees signed this document.)

On December 9, 1957, the International Longshoremen's and Warehousemen's Union, hereinafter referred to as the "Union", filed unfair labor practices charges against Respondent, in case 20-CA-1366, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (61 Stat. 136), hereinafter called "the Act". A hearing was held in Fresno, California, before Trial Examiner Howard Myers, on March 18 and 19, 1958. The Respondent filed Exceptions to the Trial Examiner's Report. The National Labor Relations Board delegated its powers in connection with this case to a three-member panel and said panel rendered its Decision and Order on May 5, 1958, adopting the Findings, Conclusions and Recommendations of the Trial Examiner, holding that the Respondent had violated Section 8(a)(1) of the Act (see R. 32-35).

A. Evidence Is Not Responsive to the Allegations Set Forth in the Complaint

Respondent alleges that the Decision and Order of the Board was based upon hearsay and inference, respectfully submits that the Order was not based upon the preponderance of proper and legal evidence, and that the Findings of Fact and Conclusions of Law are contrary to the credible evidence when the entire record is considered, in that the evidence and proof adduced at the hearing before the Trial was not responsive to the allegations and requirements of notice as set forth by petitioner's complaint. The Complaint and Notice of Hearing in Case No. 20-CA-1366

(General Counsel's Exhibit 1-C; R. 3), in the charging paragraph (paragraph VII, in subparagraph A), alleges:

> "On or about November 20, 1957, plant superintendent, Lawrence A. Young, interrogated and questioned employees as to their union activities and sympathies and warned and threatened them with loss of overtime, loss of earnings, and discharge, if they favored, joined, or assisted the Union."

The record is entirely devoid of any testimony relating to any acts or conversations participated in by Mr. Young on or about November 20, 1957. Benny Walls testified as to a yard conversation, which testimony alleges that Superintendent Young told some of the yard employees that if they did go Union, the block crew would come out and take their jobs. This testimony, by the statements of the witness, took place several days prior to the boiler room talk on November 8 and therefore, if the statements were made, which are denied, they were made prior to the filing of the petition by the Union and at a time when there was no organizational activity known to be in progress (R. 67). Further, this testimony was entirely uncorroborated by any of the other witnesses and employees alleged to have been present at the time it took place. Certainly, this does not violate any rights guaranteed employees under Section 7 of the Act.

Subparagraph B of Section VII alleges:

> "On or about December 6, 1957, supervisors Lawrence A. Young, C. H. Kuhns, Henry Hayes, Donald Robinson and Charles Coons did circulate or

had circulated an affidavit concerning the union activities and sympathies of the employees among said employees and interrogated and questioned them concerning their union activities and sympathies, and by coercion and threats induced certain of said employees to affix their signatures to the aforesaid affidavit."

Obviously, the Trial Examiner and the Board erred in determining that this affidavit was one concerning Union activities and sympathies of the employees. A careful reading of the document clearly discloses that no such inference can be drawn. The document's wording followed and copied the language of the *Globe Iron Foundry* case, 112 NLRB 1200. Insofar as the supervisor interrogating and questioning the employees "about their union activities and sympathies, or by coercion and threats inducing employees to affix their signatures on said affidavit," the credible evidence does not disclose any statements made which violate the Act and in fact, all statements are protected by the rights of free speech guaranteed by the First Amendment to the Constitution and by Section 8(c) of the Act.

Subparagraph C of Section VII charges:

"On or about December 7, 1957, Superintendent Lawrence A. Young warned and threatened certain employees that if they had not signed the aforesaid affidavit concerning the union activities and sympathies of the employees they would have been discharged."

Certainly, this paragraph needs very little comment. It is correlative to a statement that "if you had com-

mitted murder, you would have gone to jail." It shows no coercion, threats of reprisal, or promises of benefit, which would violate the provisions of the Act. Coercion by its very nature requires knowledge by the person coerced. How can an expression of intent influence an act (signing the affidavit), when it occurs subsequent to the act alleged to have been motivated by the coercion? It is interesting to note that three employees did not sign and no employees were discharged or otherwise discriminated against.

A motion was made by Respondent during the hearing, requesting that the present case be dismissed, inasmuch as the evidence was not responsive to the allegations charged in the complaint, as required by Section 101.8 of the Board's Rules and Regulations and Statements of Procedure.

B. The Trial Examiner and the Board Erred in Adopting the Findings of Fact and Conclusions of Law in the Intermediate Report and Recommended Order of the Trial Examiner

In the Intermediate Report and Recommended Order, the Trial Examiner (R. 16, 17) relies upon the fact that Mr. Young spoke to some 40 or 50 employees in the boiler room or smoke room. Of the six witnesses who testified, only one made the statement that Mr. Young stated he was "going to ascertain who had signed." This was denied emphatically by Mr. Lawrence Young. An employer, under the case decisions, is entitled to talk to his employees during a Union organizational campaign, as long as he does not use threats of reprisal or promises of benefit (*Blue Flash Express v. NLRB,* 34 LRRM 1384).

The Board relied heavily on the testimony of Benny Walls in the purported statement, "The block men will come out in the yard and take the jobs" of the yard men. Any person familiar with the cotton compress industry would know that this would be impractical and impossible, as the block crew are the key men who operate the heavy equipment inside the plant and of necessity must be maintained there. It is a custom and practice, contractual and otherwise, throughout this industry (unionized and non-unionized), for the block crews to be given maximum employment in the pre-season and post-season work. At these times, block crews may be employed in the yard when the block is not in operation. This conversation was emphatically denied by Mr. Young and even if made, it would have only related to the Union contract provisions existing in this area, and such discussions do not violate the provisions of the Act.

Great weight was placed upon the testimony of employee Canty and quotes from the record this testimony in his Intermediate Report and Recommended Order. The credibility of this witness can be attacked clearly by the statements as set forth therein. On R. page 22, the witness stated, "Well, the majority signed it already so he pointed out several names to me. I saw the name Shirley Richardson and Bonny Merrits. Those were the only two men that signed it (General Counsel's Exhibit 2) that knew what they were signing." A careful scrutiny and examination of General Counsel's Exhibit 2 will disclose that neither of the names, Bonny Merrits or Shirley Rich-

ardson, appeared thereon and it is obvious that if this statement is false (R. 125), the other testimony cannot be relied upon. The testimony of employee Demour Reason can be entirely discredited, in accordance with the facts set forth in Respondent's Brief to the Board (pages 7 and 8), in Case No. 20-CA-1366. It was physically impossible for the conversation with Mr. Young to have taken place. In fact, Reason's testimony was so incredible that the Board caused to be printed less than three pages of some ten pages of testimony at the Hearing.

ARGUMENT

The argument of the petitioner in its Brief for the National Labor Relations Board is not supported by the evidence, as the petitioner argues that the Respondent "systematically inquired of each employee whether he had signed a Union card, by soliciting his signature on an affidavit repudiating the Union." Any person of reasonable intelligence can read this document and see that it does not inquire as to whether or not an employee has signed a Union card, nor does the document repudiate the Union. The Respondent denies that any coercive statements were used at the time this document was circulated. The petitioner states that the supervisors stated that the Company "wanted" the employees to sign and that an elderly employee, in view of his age, should heed the foreman's advice and sign. Careful reading of this testi-

mony (R. 71) will show that this statement, if made, was merely a statement of the opinion of the Supervisor and did not constitute a violation of the Act. *NLRB v. International Pen Co.,* C.A. 7, 162 F. 2d 680, which sets forth the rule that a company is not responsible for supervisors' statements of their personal opinions.

The employer has a right under the law to talk to employees. In *NLRB v. East Texas Motor Freight Lines,* C.A. 5 (1944), 140 F. 2d 144, it was held proper for the employer, through its manager, to ascertain whether employees had, in fact, organized a union. In *NLRB v. McCatron,* 216 F. 2d 212, the court held that interrogation which does not contain an express or implied threat or promise does not of itself violate the Act. In *NLRB v. Protein Blenders,* 215 F. 2d 749, it was held that interrogation or polling concerning Union membership is not per se a violation of the Act. Employers may make inquiries of employees during Union organizational campaigns, providing the inquiries contain no threats or promises (*NLRB v. Associated Dry Goods Clerks,* 209 F. 2d 593, and *NLRB v. Superior Oil Co.,* 199 F. 2d 39). In *NLRB v. Western Ohio Gas Co.,* 172 F. 2d 685, the attorneys for the company drew a petition for withdrawal from the union and another petition in favor of retention of the union. Every employee except one signed the petition for withdrawal. It was held that the employer was not guilty of coercing the employees in the exercise of their rights and in this method, each employee clearly disclosed his union affiliation and/or

sympathies to the employer, which was not done in the case at hand. In *J. L. Branders & Sons,* 145 F. 2d 556, the National Labor Relations Board held it was no unfair labor practice, in view of the employer's established policy in allowing free expression on labor matters.

During an election campaign, an employer is privileged to address his assembled employees on his premises. It is "the natural forum for him." (*Goldblatt Brothers, Inc.,* 119 NLRB 1711.)

In absence of coercive remarks, such employer may make pre-election speeches and such speeches are not considered as interfering with a free election (*Louisville Cab Co.,* 120 NLRB 103).

In *Peoples Drug Stores, Inc.,* 119 NLRB 634, the majority of the Board pointed out that a retail store employer, as any other employer, is free to assemble his employees on the premises during working hours or to talk to the employees individually at their work stations.

It appears that the National Labor Relations Board in its Decision and Order overlooked the *basic principle* involved in this matter, that is, the Respondent had a good faith doubt that the Union represented any of its employees and with uncoercive questioning determined that none of the employees wanted the Union. It thereupon prepared the affidavit for the purpose of submitting it to the Board to assist the Regional Offices of the National Labor Relations Board in making a determination of whether or not

there was a sufficient showing of interest. As of this date, the employer has knowledge that seven employees favored the Union. The National Labor Relations Board administratively determines whether or not a petitioning Union has made a sufficient showing of interest and they have administratively established that 30% of the employees in an appropriate bargaining unit will constitute a sufficient showing of interest. *International Aluminum Co.,* 117 NLRB 1224. The Respondent's objective was to point out to the Board that there was no interest and that if authorization cards had been signed by the employees, they should be carefully scrutinized to determine their authenticity and current nature. In the book, "How to take a case before the National Labor Relations Board", by Louis G. Silverberg, Director of Information for the National Labor Relations Board, it is stated at page 71:

> "However, the Board has conducted special investigations and held collateral hearings into the nature of the showing of interest (e.g. whether the authorization cards were fraudulent). A party may obtain such investigation if it should submit data (e.g. affidavits) which are of sufficient weight to cast doubt on the reliability of the petitioner's showing of interest. This data, which will not be accepted as evidence at the representation hearing, may be submitted to the regional director or to the Board in Washington."

Mr. Silverberg, in connection with this statement, cites *Globe Iron Foundry,* 112 NLRB 1200 and *Royal Jet, Inc.,* 113 NLRB 1064.

This is the recommended procedure and is exactly what was done by the Respondent in this case. The Respondent followed the strict wording of the *Globe Foundry* case.

Further evidence of the inadequacy of petitioner's showing of interest, or limitations, or current nature of the authorization cards can be evidenced by an examination of the General Counsel's Exhibits 5 and 6 (R. 139). They clearly show that the dates have been altered on the application submitted into evidence by the General Counsel. Also, it is obvious that the dates on said exhibits are in a different handwriting than that of the employee applicant. It is not the position of the Respondent that this Court should determine if there is a sufficient showing of interest, but it was the position of the Respondent at the time the affidavit was circulated that the Board should review the sufficiency of the showing of interest and the Board did not administratively make a final determination until December 30, 1957.

The real test of whether an employer has interfered and coerced employees within the meaning of Section 8(a)(1) of the Act is whether the employer is engaged in conduct which tends to interfere with the free exercise of the employee's rights as guaranteed by Section 7 of the Act. Section 7 states:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

> gaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Certainly, after the circulation of the non-coercive affidavit, the rights of the employees as guaranteed under this section have not been impaired. They were, and are, free to select their own collective bargaining representative or to refrain from so doing in a secret ballot election, in accordance with the provisions of the Act.

It is also clear that the affidavit was not per se a document which inquired as to the Union sympathies of employees, nor was it coercive in nature. Therefore, the only question is whether or not the interrogation, if any, had a coercive effect. Superintendent Young's boiler room speech clearly is permissible under the decisions previously cited. There then remains only a few isolated controverted statements alleged to have been made by supervisors employed by the company. During the organizational period prior to the filing of the unfair labor practice charges, a period of 32 days, in a plant employing in excess of 86 employees, it would be a miracle if some statements were not made by the employees and their supervisors in regard to the organizational activity. Respondent's management clearly sought to obey and follow the law. They employed two attorneys for the

purpose of advising them and they cautioned their supervisors not to inquire as to the Union activities of employees and to make it very clear that Union organization would not affect their employment (R. 118, 145). It is further interesting to note that no employee was discharged or otherwise discriminated against because of Union activity.

We believe that the policies of the Act can best be effectuated by permitting the adverse parties in their representation proceeding to express their views, rather than prohibiting all forms of free speech. If there was an isolated statement made by a supervisor during this organizational period, it alone should not be the basis of finding the Respondent guilty of unfair labor practices (*Pennsylvania Power & Light Co.*, 44 LRRM 1422).

CONCLUSION

The Court of Appeals has jurisdiction to reverse an Order of the National Labor Relations Board for error of law or lack of substantial evidence to support the Board's findings. We feel that the Board has failed to scrutinize the entire record, in light of the allegations set forth in the complaint. The Respondent used legitimate and permissible tactics. For the Court to hold otherwise would deprive the Respondent of Constitutionally guaranteed rights of free speech. The rights of employees under the Act have not been interfered with. We therefore pray that

the Court make and enter its Decree dismissing this proceeding and denying enforcement of the Board's Decision and Order.

August 28, 1959.

Respectfully submitted,

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